**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT :**

**THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR**

**WEDNESDAY, THE 19TH SEPTEMBER 2007 / 28TH BHADRA 1929**

**SA.No. 351 of 1994()**
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**AS.16/1991 of DISTRICT COURT, PATHANAMTHITTA**
**OS.115/1987 of MUNSIFF'S COURT.,PATHANAMTHITTA**
**.....**

**APPELLANTS:APPELLANTS:DEFENDANTS 4 & 6:**
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1. **AMINAL BEEVI,**
   **KOIKKAL PURAYIDATHIL,**
   **VALANCHUZHI MURI,**
   **PATHANAMTHITTA DISTRICT.**

2. **PATHUMMA BEEVI,**
   **KOIKKAL PURAYIDATHIL**
   **OF ..DO...DO....**

**BY ADV. SRI.T.P.KELU NAMBIAR (SR.)**
**SRI.P.G.RAJAGOPALAN**
**SMT. NARAYANIKUTTY CHETTUR**

**RESPONDENTS: RESPONDENTS 1TO 3 & 5 TO 9:**
**ADDITIONAL PLAINTIFFS 2 TO 4 AND**
**DEFENDANTS 2,3,5,7 & 8:**
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1. **PATHUMUTHU BEEVI,**
   **PETTATYIL THOZHUKALAYIL VEEDU,**
   **VETTIPURAM MURI, P.O.PATHANAMTHITTA,**
   **PATHANAMTHITTA DISTRICT.**

2. **MANJU MEERAN (MINOR, AGED 10).**

3. **RANI MEERAN, (MINOR, AGED 7)**
   **(MINOR RESPONDENTS 2 & 3 BY GUARDIAN MOTHER**
   **1ST RESPONDENT PATHUMUTHU BEEVI)**

*KSS*

**..2/-**

**4. AYISHA BEEVI,**
**KOIKKAL PURAYIDATHIL,**
**VALANCHUZHI MURI, P.O.PATHANAMTHITTA,**
**PATHANAMTHITTA DISTRICT.**

**5. SHAHUL HAMEED, OF ...DO...DO....**

**6. MUHAMMAD HANEEFA, OF..DO..DO...**

**7. ABDUL LATHEEF, OF ...DO...DO....**

**8. SHAMSUDEEN,**
**SHARAF MANZIL,**
**VETTIPURAM MURI, PATHANAMTHITTA PETTA,**
**P.O. PATHANAMTHITTA,**
**PATHANAMTHITTA DISTRICT.**

**BY ADV. SRI.M.NARENDRA KUMAR for R1 toR3**
**SMT.K.P.SANTHI for R4 to R7**

**THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 19/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

*KSS*

**M.SASIDHARAN NAMBIAR,J.**

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S.A. NO.351 OF 1994

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Dated this the 19th day of September, 2007

JUDGMENT

Defendants 4 and 6 in O.S.115/1987 on the file of Munsiff Court, Pathanamthitta are appellants. The widow and children of deceased plaintiff who were impleaded as plaintiffs 2 to 4 are respondents 1 to 3. The other respondents are the other defendants in the suit. The suit was filed seeking a decree for declaration that the cancellation deed whereunder Ext.A1 gift deed, was cancelled and the subsequent assignment deed executed by first defendant in favour of 8th defendant are not valid and binding on the plaintiffs or the plaint schedule properties and for partition of the plaint schedule properties into six equal shares and allotment of one such share to the plaintiffs.

2. Plaint schedule properties admittedly originally belonged to first defendant. Under Ext.A1 gift deed executed on 22.6.1964, he gifted

the properties in favour of second defendant widow and plaintiff and defendants 3 to 6. 7th defendant was born to second defendant and subsequent to the execution of Ext.A1 gift deed and seventh defendant was not one of the donees. Only plaintiff and defendants 2 to 6 have right under Ext.A1. Second plaintiff is the widow and plaintiffs 3 and 4 are the children of deceased sole plaintiff. They were impleaded as his legal heirs on the death of the plaintiff. Subsequent to the execution of Ext.A1 gift deed, in 1985 first defendant executed a deed of cancellation of Ext.A1 gift deed. Thereafter in 1986 he assigned the property in favour of 8th defendant, a stranger. The case of plaintiff was that as Ext.A1 gift deed was accepted and acted upon, first defendant has no right to cancel the gift or execute an assignment deed and therefore plaint schedule properties are available for partition and are to be divided between the plaintiff and defendants 2 to 6 and as seventh

defendant was born subsequent to the execution of Ext.A1, he is not entitled to a share. First defendant along with defendants 4 and 6 (the appellants) filed a written statement contending that though Ext.A1 gift deed was executed when the plaintiff and others were minors the gift was not acted upon or accepted and therefore first defendant had every right to cancel the same and the cancellation deed was executed in 1985 is valid and first defendant is entitled to transfer the property and the assignment deed executed in 1986 is also valid and plaintiff is not entitled to the decree sought for.

3. Learned Munsiff on the evidence of PW1, Dws. 1 and 2, Ext.A1 and Exts.B1 to B7 found that Ext.A1 gift deed was accepted by the donees. As it was acted upon and accepted, first defendant is not competent to cancel the gift thereafter. It was therefore held that the cancellation deed and subsequent assignment deed executed by first

defendant are not valid and binding on the plaintiff or the plaint schedule property and as the deceased plaintiff and defendants 2 to 6 are the donees who have equal right in the properties, they are entitled to get 1/6 share each. A preliminary decree for partition was passed directing allotment of 1/6 share to the plaintiffs 2 to 4 as legal heirs of original plaintiff. Learned Munsiff also found that plaintiffs are entitled to get allotment of the house in item No.1 of the properties, as far as possible. The preliminary decree was challenged before District Court, Pathanamthitta in A.S.16/1991. When the first appeal was heard, appellants did not dispute the finding of the trial court that Ext.A1 gift deed was accepted by the donees and thereafter it cannot be cancelled and so the cancellation deed and assignment deed are not valid. Recording that submission, learned District Judge considered the only point argued before that court namely

reservation of the residential house to the plaintiffs. Accepting the findings of learned Munsiff, appeal was dismissed. It is challenged in the second appeal.

4. The appeal was admitted formulating the following substantial questions of law.

1. Whether equitable direction to allot a house to a sharer having only 1/6 share is legal and proper.

2. Whether courts below correctly comprehended the law relating to gifts under Mohammaden Law and if so, whether the finding that Ext.A1 gift deed is valid, is sustainable.

5. Learned counsel appearing for appellants and the contesting respondents were heard.

6. The argument of learned counsel appearing for appellants is that when a concession is made by a counsel, without getting it recorded in writing first appellate court should not have acted upon the concession or decided the first

appeal on the basis of the concession. It was argued that in the light of the settled principles the oral evidence on record is insufficient to prove a valid gift under Mohammadan Law and therefore first appellate court should not have confirmed the findings of the trial court that Ext.A1 gift deed is binding. Learned counsel relied on the decision of this court in **Thankammal v. Velu Achari (1980 KLT 718 and in Aley Antony v. Ouseph Chacko (2004(2) KLT 867)** in support of this submission. Learned counsel then argued that in any case the question of reservation of the house should not have been decided in the preliminary decree and it should have been left open to be decided in the final decree. It was argued that when plaintiffs are only having 1/6 shares, the direction to allot the only house to the plaintiffs is inequitable and the circumstance that may be prevailing at the time of the final decree should be considered

while allotting the house and therefore the reservation of the house by courts below is to be set aside.

7. Learned counsel appearing for contesting respondents relying on the decision of the Apex Court in **Commissioner of Endowments v. Vittal Rao (2005) 4 SCC 120** argued that when the first appellate court recorded that at the time of arguments finding of the trial court that Ext.A1 gift deed was accepted and acted upon was not challenged, it is not open to the appellants to contend before this court that no concession was made as recorded by the court or that the concession made was not at the instance of appellants and if at all the remedy of the appellants is only to file an appropriate application before the first appellate court without delay to correct the mistake if any and on the allegation that there was no admission finding of the first appellate court cannot be

interfered. Learned counsel also argued that trial court and first appellate court on the facts and circumstances of the case found that plaintiffs are entitled to get reservation of the house and it was also made clear that it is only as far as possible and therefore no modification to the decree is warranted.

8. In Thankammal's case (supra), a learned single Judge of this Court had occasion to consider the consequence of a court committing an inadvertant error or mistake in noting that a party did not press his case are extremely grave and may result in perversion of justice. The learned single Judge held:-

> "Every court which bases its decision on concession by a party or counsel must satisfy itself that it has not made a mistake in understanding the party or counsel and must express what has been

submitted to it in unequivocal and unambiguous terms. There should be no room for speculation as to the meaning, scope or extent of the concession. If what the court has recorded by way of concession by a party or relinquishment of a plea by him is equivocal and is not expressed in clear and specific terms the appellate or revisional court would be justified in not acting on it. Who made the concession and what was the exact scope of the concession are matters which should be apparent from the order, if the court is to sustain such an order. Prudence should dictate to the Court that concession by a party should be brought on record signed

> by the party or counsel. In the absence of such a record court stands the risk of an appellate or revisional court scrutinising the statement in its order closely and carefully to see whether it should be acted upon."

9. The learned single Judge in **Aley Antony v. Ouseph Chacko (2004(2) KLT 867)** has also expressed in similar view. It reads:-

> "Whenever courts or tribunals proceed to take decisions on the basis of concessions by parties or counsel on questions of fact as well as on mixed questions of law and fact, it is desirable to have the concessions noted down in writing

> under the signatures of the party or atleast the counsel lest controversies should recur."

Admittedly no written concession was made either by appellants or their counsel before the first appellate court. It is for that reason learned counsel appearing for appellants argued that no such concession was made and the question whether Ext.A1 gift deed was accepted or not should be decided on the evidence on record.

10. In the light of the subsequent declaration of law by the Apex Court, on the controversy appellants cannot be allowed to challenge the concession recorded by the first appellate court in its judgment. When the court in its judgment recorded that a concession was made regarding a point, which was canvassed before that court, the question is whether before an appellate or

revisional court, the party is entitled to canvas that no such concession was made. Relying on the earlier decisions in **State of Maharashtra v. Ramdas Shrinivas Nayak and another (1982) 2 SCC 463, Bhavnagar University v. Palitana Sugar Mill (P) Ltd, (2003) 2 SCC 111), Roopkumar v. Mohan Thedani (2003)6 SCC 595, Apex Court in Central Bank of India v. Vrajlal Kapurchand Gandhi (2003) 6 SCC 573** held that a party is not entitled to canvas against what is recorded by the court in its judgment regarding concession made to that court and the only course open to that party is to approach that court by filing a petition pointing out the error recorded in the judgment. It was held:-

> "Statement of fact as to what transpired at the hearing recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by

an affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment it is incumbent upon the party, while the matter is still fresh in the minds of the judges, to call the attention of the very judges who have made the record. That is the only way to have the record corrected. If no such step is taken the matter must necessarily end there. It is not open to the party to contend before the superior court to the contrary and the superior court cannot launch into an enquiry as to what transpired in the other court."

11.That position has been subsequently reiterated by the Apex Court in Commissioner of Endowments and Others (2005) 4 SCC 120) (supra). It was held:

> "There was some dispute as to whether the learned Advocate General himself appeared on the date when the writ petition was disposed of by the learned single Judge in terms of the compromise or his junior appeared. In the impugned judgment, it is stated that the State Government was duly represented by a lawyer. In State of Maharashtra v. Ramdas Shrinivas Nayak (1982) 2 SCC 463 dealing with the

practice and procedure regarding statement of fact recorded in the judgment of a court, this Court held that such a statement is conclusive and not open to be contradicted in appeal. Paras 4 to 8 of the said judgment read:(SCC pp.467-68).

"When we drew the attention of the learned Attorney General to the concession made before the High Court, Shri.A.K.Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who

appeared for Shri.A.K.Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submissions made by him in the High Court. We are afraid that we cannot launch into an enquiry as to what transpired in the High Court. It is simply not done. Public policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena."Judgments cannot be

treated as mere counters in the game of litigation (per Lord Atkinson in Somasundaram Chetty v. Subramanian Chetty). We are bound to accept the statement of the judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle

is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the judges, to call the attention of the very judges who have made the record to the fact that the statement

made with regard to his conduct was a statement that had been made in error (per Lord Buckmaster in Madhu Sudan Chowdhri v. Chandrabati Chowdhrain). That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an appellate court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice, but he may not

call in question the very fact of making the concession as recorded in the judgment.

5. In R.v.Mellor Martin, B. was reported to have said:

"We must consider the statement of the learned Judge as absolute verity and we ought to take his statement precisely as a record and act on it in the same manner as on a record of court which of itself implies an absolute verity.

6. In King-Emperor v. Barendra Kumar Ghose J. said:

...these proceedings

emphasise the importance of rigidly maintaining the rule that a statement by a learned Judge as to what took place during the course of a trial before him is final and decisive: It is not to be criticised or circumvented: much less is it to be exposed to animadversion.

7. In Sarat Chandra Maiti v. Bibhabati Debi Sir Asutosh Mookerjee (AIR 1921 Cal.584)explained what had to be done:

...It is plain that in cases of this character where a litigant feels aggrieved by the statement in a judgment

> that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge without delay and ask for rectification or review of the judgment....
>
> 8. So the judges' record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the judge himself, but nowhere else."

In the light of the law as declared by the Supreme Court, appellants cannot be allowed to contend before this court that they did not make a concession before the first appellate court with regard to the validity of Ext.A1 gift. The question whether Ext.A1 gift deed was accepted and

acted upon is a question of fact. The finding of fact by the first appellate court is final. When that finding of fact was rendered by the first appellate court on the concession made by the appellants that cannot be challenged in the second appeal. If so appellants as legal heirs of the original plaintiff and defendants 2 to 6 are entitled to one share each in view of Ext.A1. As rightly found by courts below, each of them is entitled to 1/6 share. The preliminary decree directing division of the properties into six equal shares and allotment of one such share to the appellants is perfectly correct.

12. Then the question is whether the direction to allot the residential house in item No.1 to the appellants is sustainable. As rightly argued by learned counsel appearing for appellants the question of reservation should ordinarily be left open to be decided in the final decree, except for compelling reasons. The judgment of the trial

court shows that question of reservation of the residential house in item No.1 of the plaint schedule properties was not an issue framed or considered. It was only while directing division of the properties, trial court directed that the residential house is to be allotted to the appellants. When they are only entitled to one share in the properties like defendants 2 to 6 and in the absence of compelling reason warranting a reservation of the house to them such reservation should not have been made in the preliminary decree. As rightly pointed out by learned counsel appearing for appellants, before the final decree is passed, it may be brought to the notice of the court that appellants have constructed a house or they have another residential house and among the other sharers, one is not having any residential house at all. In such circumstance, if a direction is given in the preliminary decree for allotment of the residential building to the

appellants it may tie the hands of the first appellate court to do justice or prevent an equitable allotment of the shares in the final decree. In such circumstance, finding of the trial court, confirmed by first appellate court that the residential house in item No.1 shall be allotted to the appellants as far as possible is set aside and that question is left open to be decided in the final decree.

Appeal is allowed in part. While confirming the preliminary decree the direction to allot the residential house in item No.1 of the plaint schedule properties to the appellants is set aside. The question of reservation is left open to be decided in the final decree.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

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W.P.(C).NO. /06

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JUDGMENT

SEPTEMBER,2006